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No. 97-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

v.

Mr. Doe and Mrs. Doe,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION TO PROCEED IN FORMA PAUPERIS AND BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Supreme Court Rule 39.1, Respondents in the above-captioned matter move the Court for an order permitting them to proceed in forma pauperis. In the proceedings in the state courts, Respondents sought and were granted appointed counsel pursuant to S.C. Code Ann. § 20-7-110(2)(Supp. 1996). A copy of the order of the Horry County Family Court appointing Mr. Tom Moran, Esquire, of the undersigned's law firm as counsel for Respondents is attached for reference. The undersigned's law firm has represented Respondents, by appointment, through the appeals

before the South Carolina Court of Appeals and South Carolina Supreme Court.

Wherefore, Respondents, by counsel, respectfully request that they be permitted to proceed in forma pauperis before this Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: _____

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Columbia, South Carolina

9/10, 1997

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT CASE NO. 92-DR-26-3244
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES, PLAINTIFF, vs. DAN HERRING AND LAURA HERRING, DEFENDANTS, IN RE: James Herring, Savannah Herring, and Teresa Herring, minor children under the age of eighteen (18) years.	**MOTION** **and** **ORDER** **(on remand from appeal)**

NOTICE OF MOTION AND MOTION

TO THE PLAINTIFF ABOVE-NAMED AND THE GUARDIAN AD-LITEM:

YOU WILL PLEASE TAKE NOTICE that five (5) days after service of this notice upon you, or as soon thereafter as counsel may be heard, the undersigned attorney for the Defendants will move before this Honorable Court for an Order substituting counsel for the Defendants.

The grounds for this Motion are set forth in the attached Motion to Remand for Substitution of Counsel (inter alia) before the Supreme Court. Also attached is a copy of the notice of the Order of the Supreme Court granting said Motion.

I SO MOVE.

Richard L. Foltz
Attorney for Defendants

Dated: 3/8/95
Myrtle Beach, South Carolina

3/9/95

Affirmation of Counsel:

Moving Counsel hereby affirms that he has communicated with opposing Counsel in this matter and that opposing Counsel do not object to this Motion.

Richard L. Foltz
Moving Counsel

Dated: 3/8/95
Myrtle Beach, South Carolina

ORDER

UPON CONSIDERATION of the foregoing Motion and for good cause shown, it is therefore

ORDERED, that Richard L. Foltz is hereby relieved as attorney for Defendants and that Tom Moran, Esquire, is hereby appointed and substituted in his stead. It is further

ORDERED, that copies of this Motion and Order be served upon substituted counsel, opposing counsel and filed with the Clerk of the Supreme Court within ten (10) days. It is further

ORDERED, that jurisdiction in this case is released back to the Supreme Court.

AND IT IS SO ORDERED.

Kaye G. Hearn
Chief Administrative Judge

Dated: March 27, 1995
Conway, South Carolina

No. 97-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In the Interest of: the Children of whom Sandra Overcash is Guardian ad Litem,

Petitioner

v.

Mr. Doe and Mrs. Doe,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner selectively states the procedural history of the case and the evidence presented in the merits hearing before the family court. Pursuant to Sup. Ct. R. 15.2, Respondents submit this counter-statement of the case.

I. Procedural History

The merits hearing before the family court was held on August 4, 5, and December 7, 1993. On January 4, 1994, the family court entered its written order finding that the plaintiff, the Horry County [SC] Department of Social Services,[1] [hereinafter referred to as "DSS"] had failed to prove its claims of abuse against Respondents. On motion for reconsideration, the family court amended certain findings of fact, but not its conclusion of law that DSS had failed to prove abuse. At no point in the family court proceedings did DSS or Petitioner move to recuse the family court judge or otherwise raise the issue of bias with the family court.

The petition brushes past the next step in the procedural history of the case. Petitioner exercised her right to appeal. The South Carolina Court of Appeals received the briefs of Petitioner and Respondents. It heard oral argument. Petitioner

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[1] DSS, the plaintiff, did not appeal the findings of the family court to the South Carolina Court of Appeals, did not join in the petition for certiorari review to the South Carolina Supreme Court and has not joined in the petition to this Court. Since remand of the matter by the South Carolina Supreme Court to the family court, DSS has specifically "unfounded" the case on May 20, 1997, and requested to be relieved of custody on July 29, 1997. Respondents' Appendix at 6-7, 9-10.) The case has been dismissed. (Resp. App. at 1-3.)

raised, for the first time, the question of bias on the part of the family court.

In an unpublished decision filed January 23, 1996, the court of appeals affirmed the decision of the family court and remanded for further proceedings. It particularly noted that the family court's decision "dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations." (Petitioner's Appendix at p. 7A.) The court of appeals remanded for further finding on the issues of neglect and mental abuse because the family court had not made "specific findings of fact and conclusions of law" on those issues as required by Rule 26, SCRFC. (Pet. App. at 8A.) Petitioner's request for rehearing and rehearing en banc was denied.

Having received full appellate review of the family court's orders by the court of appeals, Petitioner sought further, discretionary review from the South Carolina Supreme Court. See Rule 226, SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion . . . ."). The supreme court initially granted the writ, received briefs and heard oral argument. The supreme court subsequently dismissed the writ as "improvidently granted," noted that it could make no "finding of what is in the best interests of the children" due to the insufficiency and staleness of the record, and remanded for further proceedings. (Pet. App. at 3A.)

On remand, DSS "unfounded" the case against Respondents and requested that it be relieved of custody. (Resp. App. at 6-7, 9-10.) At a merits hearing on August 7, 1997, the family court, with a different judge presiding, dismissed the case in its entirety finding that there was no evidence of abuse of any type. (Resp. App. at 2.) Petitioner offered no evidence at the hearing.

II. The Evidence at Trial

The Petition presents a one-sided litany of the evidence presented at the merits hearing in the family court. The other evidence, which the family court chose to believe, is set forth below.

The three children at issue in the case are James, Teresa and Savannah. DSS became involved in this case after Respondent took James to the Medical University of South Carolina ("MUSC"). Since the age of two, James exhibited numerous signs of hyperactivity and attention deficit disorder. James would often hold his breath until he lost consciousness. (Resp. App. at 33.) In response to these problems, the Parents sought medical attention for James. Respondents saw at least four separate medical and psychiatric providers in an effort to correct James' behavioral problems. (Resp. App. at 33-37.)

In September, 1991, Respondents began taking James to Dr. Tom Petrusick in Myrtle Beach, South Carolina. (Resp. App. at 41-42.) After several medications failed to correct James' behavioral problems, Respondents agreed to have James admitted to MUSC for observation in 1992. (Resp. App. at 43.)

In late 1992, DSS was notified by an unidentified employee[2] at MUSC that James had made statements describing sexual abuse by his father. Based upon this information, DSS obtained an ex parte order on November 23, 1992, to remove Savannah and Teresa from Respondents' home and to retain custody of all three children. (Pet. App. at 9A-12A.)

The first witnesses called by the defense were Respondents. They testified at length about their relationships with their children and their efforts to properly raise them. Each testified that they were actively involved in and regularly attended their local church congregation. (Resp. App. at 31, 66-67.) All three children regularly attended church with their parents (Resp. App. at 32.), and were seen regularly by the other church members.

Both parents testified at length as to the behavioral problems that James exhibited while growing up. (Resp. App. at 38-40.) The father testified that James was taken to several doctors in an effort to treat James' hyperactivity. (Resp. App. at 33, 37.) Respondents also testified about James' behavioral problems, commenting that the medications provided by James' physicians were very rarely successful. (Resp. App. at 42, 75.) The family court found it unlikely that parents who were abusing their child would present that child to so many medical personnel. (Pet. App. at 22A.) The family court also noted that there was no evidence at

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[2] This person was never identified by DSS or Petitioner and was not produced as a witness at the trial before the family court.

trial that any of these doctors ever expressed a belief that James had been abused. (Pet. App. at 23A.)

When asked whether James had experienced any physical problems, the Respondents indicated that James had developed a cyst on his penis as a result of a foreskin problem. A salve was prescribed by a doctor which was to be applied topically to the cyst. (Resp. App. at 48-49.) The mother testified that she would apply the salve to the cyst after taking James out of the bathtub. (Resp. App. at 80-81.) Both parents denied that there was ever any other form of touching James in that area.

Respondents also testified about the vaginal rashes and bladder infections that plagued Savannah during her early childhood. The father testified that in addition to these problems, Savannah was treated by medical professionals for severe constipation. (Resp. App. at 44-45.) The mother testified that these problems caused Savannah to occasionally display abnormal wetting, etc. (Resp. App. at 76-77.) Other than Savannah's problems, Respondents denied that either of the girls displayed any abnormal activity relating to their genitalia.

Respondents denied that they had abused any of their children in any way. The father testified that, with the exception of spankings, he never struck any of his children. (Resp. App. at 46.) He also denied that he engaged in any sexual talk or language around the children. (Resp. App. at 47.) He emphatically denied that he ever touched his daughters in a sexual way. (Resp. App. at 54.) Similarly, the mother denied that the children were ever

struck by her or her husband. (Resp. App. at 79.) She denied that her children were ever touched in an abnormal way. (Resp. App. 78.) Finally, she denied that she abused her children in any way (Resp. App. at 82), or that she ever saw her husband abuse the children. (Resp. App. at 83.)

Several family members also testified that they had never witnessed signs of any physical or sexual abuse of the children. Oscar Woodcock (an uncle) testified that he lived with the Respondents for a period of approximately seven months prior to the children's removal from the home. (Resp. App. at 94-95.) During the time that he lived with Respondents, he once saw James showing his penis to Savannah. (Resp. App. at 93.) Other than that, he never saw any sexual acting out by the children.

Another uncle, William Woodcock, also testified that he had been living with Respondents since early 1991. William testified that during the time that he lived with Respondents he never saw the children engaging in any sexually explicit play or actions. (Resp. App. at 96.)

Ruth Midgette, a grandmother, testified that she had never seen the children act out sexually in any way. (Resp. App. at 92.) There was also testimony from Teresa Williams, an aunt, who stated that she saw Respondents on an almost daily basis. She testified that she never witnessed the girls playing in a sexual way with their dolls. (Resp. App. at 88.) She also testified that she had never heard either girl talk about being physically or sexually abused. (Resp. App. at 88.) Ms. Williams testified

extensively about the hyperactivity exhibited by James. She also testified that James would lie to her when she caught him doing something wrong. (Resp. App. at 87.) This testimony is certainly relevant as to whether James' testimony at trial was truthful.

Two friends of Respondents also provided testimony. Ms. Nancy Booth testified that she attended church with Respondents. Ms. Booth was the Sunday school teacher for the three children. She testified that James was difficult in class because of his behavioral problems. (Resp. App. at 84.) Ms. Booth, like Ms. Williams, testified that James would lie to her in class when she would catch him doing something wrong. (Resp. App. at 85.) Ms. Booth also stated that she never observed anything unusual about the relationship between Respondents and their children. (Resp. App. at 86.)

Another member of the parents' church congregation, Mr. Windell Jeffords, also took the stand on their behalf. Mr. Jeffords testified that he saw the children at church regularly with their parents (Resp. App. at 89), and also when visiting the home. Mr. Jeffords testified that he never saw James acting out sexually in any way. (Resp. App. at 90.) He also testified that he never saw any of the children engaging in any self-touching or other sexual acts. (Resp. App. at 91.)

Dr. Schuh's testimony did indicate that Savannah had two small vaginal scars and two small anal scars. According to Dr. Schuh, Teresa's exam revealed no evidence of injury to her vaginal opening or her hymenal tissues. Dr. Schuh did note two anal tag

scars on Teresa. On cross-examination, however, Dr. Schuh indicated that Savannah's anal scars could possibly have been caused by severe, and medically documented, constipation problems that she suffered as a baby. (Resp. App. at 28-30.) Dr. Schuh also noted that while Teresa's anal scars were consistent with signs of sexual abuse, they could also be congenital. (Id.)

Petitioner points out that Teresa told Dr. Schuh that her father had inserted a needle into her anal area. Petitioner does not, however, point out that Dr. Schuh testified that this statement by Teresa was "confusing." (Resp. App. at 30.) Dr. Schuh went on to indicate that Teresa had no evidence of any needle scars in her anal area, nor could she understand why Teresa referred to the needle as black in color. Dr. Schuh testified that this statement made by Teresa would need to be explored further before it could be understood. (Id.)

Savannah made numerous statements that denied specific allegations of abuse asserted by DSS. Savannah twice denied that her father ever penetrated her with a finger. (Resp. App. at 17, 21.) She denied that she was ever stuck with a needle (Resp. App. at 18.); denied being bathed by her father (Resp. App. at 19.); denied that she had ever seen her father's penis (Resp. App. at 20); and denied that she was ever asked to rub her mother's vagina. (Resp. App. at 22.) Finally, Savannah testified that none of the children was ever stuck with a needle or pin by the parents. (Id.)

With respect to the testimony of Teresa, appellant takes exception to language in the family court's order indicating that

Teresa's use of the anatomically correct dolls was rehearsed. A review of the transcript of Teresa's testimony certainly indicates that Teresa proceeded in a very mechanical fashion with respect to the dressing and undressing of the anatomically correct dolls. She gave numerous directions to Ms. Pepper, who was assisting her with the use of the dolls, as to when the clothing should be on and off, how they should be removed. (Resp. App. at 12-17.)

With respect to Teresa's specific testimony, it is full of contradictions. Teresa began her testimony by stating that her parents had never hurt her. (Resp. App. at 11.) She then indicated that her parents had "touched" her. (Id.) She indicated that her father never touched her (Resp. App. at 12), but later indicated that her father penetrated her with three fingers. (Resp. App. at 16.) She also indicated that she had never touched her father (Resp. App. at 12), but later indicated that she had. (Resp. App. at 15.)

Teresa was very clear in denying other specific allegations of abuse. She testified that her father never put his penis in her mouth (Resp. App. at 13), and that he never gave her a bath. (Resp. App. at 14.) Some of Teresa's most important testimony directly contradicted the statements Dr. Schuh made in connection with Teresa's rectal examination. She specifically stated that she never saw a needle or was stuck with one. (Resp. App. at 13.) She also stated that neither of her parents had ever hurt her in the anal area. (Id.)

James' testimony contains numerous denials of DSS's allegations of sexual abuse. James stated that his parents never rubbed his private parts (Resp. App. at 23), and that his parents never touched him with his pants off. (Id.) James also denied that he ever touched his father when he had his pants off (Resp. App. at 24), or that his mother ever touched him when his pants were off. Further, James denied that his mother or father ever touched him on his hiney. (Id.)

Other parts of James' testimony are contradictory at best. At one point, James stated that he was never injured by a needle (Resp. App. at 25), while later testifying that his father had stuck a needle in his private parts. (Resp. App. at 27.) In addition, DSS presented a drawing that James had made prior to the hearing depicting his father touching him in his private parts. In response to further questioning about this drawing, however, James indicated that "Ms. Thea" had asked him to draw the picture. (Resp. App. at 26).

James was never asked about any statements he allegedly made to employees at MUSC while he was there. It was these alleged statements that began DSS involvement with the children. It was alleged that James, while at MUSC, had accused his father of performing oral sex on him. There were no witnesses at trial, however, that corroborated any such statements made by James. The family court noticed this apparent inconsistency and referred to it in its final order. (Pet. App. at 27A.)

GROUNDS FOR DENYING THE PETITION

I. NO RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED TO PETITIONER.

Only by pretending that review by the South Carolina Court of Appeals never occurred can Petitioner advance her first argument. Petitioner seeks relief in the form of "meaningful appellate review . . . in protective custody cases nationwide." (Petition, p. 21.) She got the review she seeks from this Court from the South Carolina Court of Appeals.

The court of appeals accepted briefs from the parties. Oral argument was heard. The court of appeals had before it the entire record as presented by the parties.

Given this full review, Petitioner[3] simply lost the appeal on two of the most fundamental bases known to law: credibility of the witnesses and burden of proof. Neither of these two bases raise constitutional concerns requiring the exercise of this Court's certiorari powers. As stated by the court of appeals:

> The factors leading to the family court's findings that DSS provided insufficient proof of sexual and physical abuse dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations.

(Pet. App. at 7A.) As noted by the court of appeals and as illustrated by the competing versions of the testimony set forth in the petition's statement of the case and this response's statement of the case, "[a]though the record reflects much evidence

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[3] As previously noted, DSS did not appeal.

supporting physical and sexual abuse had the Family Court made such a finding, we find no abuse of discretion warranting . . . reversal of the family court's conclusion that the requisite evidence was lacking." (Pet. App. at 7A.)

Full appellate review was not evaded in this matter as contended by Petitioner. The South Carolina Court of Appeals decided the matter on the record made in the family court. Consequently, there is no conflict, as suggested by the petition, between what actually transpired in this case and this Court's statements, as presented in the petition, in Anderson v. Bessemer City, 470 U.S. 564, 577 (1985), ICC v. Jersey City, 322 U.S. 503 (1944), or Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 294-95 (1974), regarding the need for review on the trial record.

That Petitioner failed to get a second bite at the appellate apple is of no constitutional moment. Under the South Carolina Appellate Court Rules, the granting of a writ of certiorari is an act of "sound judicial discretion." Rule 226(b), SCACR. This mirrors this Court's own statements regarding the "right" to review by writ of certiorari. See Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion"). In this case, the South Carolina Supreme Court received briefs and oral arguments and simply concluded that further review beyond that granted by the court of appeals was inappropriate under the circumstances.

Despite a torrent of rhetoric concerning the rights of children, the petition, at bottom, is really an attack on the factual findings of the family court, affirmed by the court of appeals after full review under accepted standards of review. Under this Court's own rules, "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," granting a writ of certiorari is rarely appropriate. Sup. Ct. R. 10. The petition should be denied in this case.

II. THE MATTER IS MOOT.

The children in this case were returned to their parents immediately following the decision of the family court. Neither DSS nor Petitioner ever moved to stay the order of the family court returning the children to the parents. DSS never appealed at all. The children have lived at home since December 1993.

DSS has since "unfounded" the case. (Resp. App. at 10.) The caseworker in charge of the matter has investigated the home and found it "clean and without any health or safety hazards." Resp. App. at 9.) The caseworker has stated under oath that "the children appear to be comfortable in their surroundings; they seem to have a good relationship with their father and he has praise for the children. They do not appear to be afraid of him." (Resp. App. at 9-10.) The caseworker has concluded that "the minor children are not in threat of harm." (Resp. App. at 10.) The family court has dismissed the case. (Resp. App. at 1-3.)

The absence of a live case or controversy at all stages of the appellate process deprives this Court of subject matter jurisdiction. DeFunis v. Odegaard, 416 U.S. 312 (1974). Here, the children are at home and safe. South Carolina public policy has been achieved. The South Carolina Legislature has provided that "[i]t is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily." S.C. Code Ann. § 20-7-20(D) (1985). South Carolina courts consistently apply this legislative mandate to family court matters. In DSS v. Johnson, 394 S.E.2d 721 (S.C. App. 1990), the court recognized the mandate that the goal is to "reunite the child with his family." Id. at 721 n. 1. The court recognized that even in cases where abuse has been shown, DSS is required to establish a plan to bring the family together. The court cited S.C. Code Ann. § 20-7-764 (1985), which states:

> The agency plan shall provide the court with a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what action the agency will take to maintain ties between the parent and child. Whenever possible, the plan must be prepared with the participation of the parents, the child and any other agency or individual that will be required to provide services.

Johnson, 394 S.E.2d at 722 (citing S.C. Code Ann. § 20-7-764 (1985)).[4]

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[4] The statute has since been amended, but still directs that the treatment plan be oriented to correcting problems in the home "in the shortest possible time in order to expedite the child's return to the home." S.C. Code Ann. § 20-7-764(B)(1)(b) (Supp. 1996).

The policy of the State of South Carolina is to keep families together. That has been achieved, even assuming everything charged by Petitioner is true. Granting the petition at this point would serve no purpose as the South Carolina courts would be compelled to conduct further review with this stated goal and the current condition of the home in mind. The petition should be dismissed as moot.

III. THE ISSUE OF JUDICIAL BIAS WAS NOT PROPERLY RAISED IN THE FAMILY COURT.

Despite claims of bias, Petitioner never raised the issue with the family court. No motion for recusal was ever filed. The trial court was given no opportunity, in the first instance, to address the charge. The issue appeared, for the first time, on appeal before the South Carolina Court of Appeals.

Under state procedural rules, failure to raise the issue of bias or prejudice in the trial court bars appellate review. In Payne v. Holiday Towers, 321 S.E.2d 179, 183 (S.C. 1984), the South Carolina Supreme Court held that appellant's claim that "unspecified rulings during the hearing 'clearly show[ing] that the trial judge was in fact biased' was not presented to the circuit judge and, therefore, is not properly before this court." Id. at 183.

The question of bias was not preserved for review. The petition should be dismissed.

IV. THERE IS NO EVIDENCE OF BIAS WARRANTING REVIEW BY THIS COURT.

The family court applied accepted standards for admitting and weighing infant testimony. Petitioner cites statements in the

family court's orders regarding child memory and contends that the family court's acts of observing and weighing infant testimony, according to the laws established by this state, is an error of law which must be reversed.

South Carolina has consistently recognized the potential unreliability of testimony presented by children of tender years and required special inquiries into the knowledge and credibility of infant witnesses. While a child of tender years is not per se incompetent because of age, special factors must be considered before the child's testimony is considered by the trier of fact. South Carolina DSS v. Doe, 355 S.E.2d 543 (S.C. App. 1987). As noted by the South Carolina Court of Appeals:

> A child's competency to testify depends on showing to the satisfaction of the trial judge that the child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth if he lies.
>
> The question of competency of a child witness is to be determined by the trial judge. In making his determination, the judge must rely on his personal observation of the child's demeanor and responses to inquiry on voir dire examination.
>
> The judge has the duty to make an independent judicial determination of competency.

Id. at 547.

The South Carolina legislature has consistently recognized the special concerns associated with child testimony. S.C. Code Ann. § 19-1-180 (Supp. 1994) sets forth a ten-part test to be used when viewing hearsay evidence of a child under the age of twelve:

(1) the child's personal knowledge of the event;

(2) the age and maturity of the child;

(3) certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) any apparent motive the child may have to falsify or distort the event including bias, corruption, or coercion;

(5) whether more than one person heard the statement;

(6) whether the child was suffering pain or distress when making the statement;

(7) the nature and duration of any alleged abuse;

(8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;

(10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

Age is a significant factor in determining the reliability of statements. The legislative mandate requires the court to consider whether the child has been coached, the age of the child, the child's motive, and the circumstances surrounding the statement. Petitioner asks this Court to rule that the family court's recognition of the law regarding the special concerns associated with child testimony was an error of law. Petitioner's assertion that the family court's statement regarding the unreliability of infant testimony is an extrajudicial and improper basis is unfounded. The family court followed the laws of South

Carolina recognizing concern with this type of testimony and supported its findings with evidence presented at trial.

In this case, the children were taken from Respondents on November 23, 1992. (Pet. App. at 9A-12A.) For the next thirteen months, the children were in the care of DSS. The Respondents, in that entire time period, were never permitted to visit with the children alone. (See Pet. App. at 15A-17A.) The children were subjected to extensive counselling with anatomically correct dolls. (Pet. App. at 21A.) None of these sessions was taped. (Id.) Despite the intensive counselling and exclusive control exercised by DSS, the children still gave testimony exonerating their parents. The family court observed the children's testimony, such as that of Teresa, and due to the inconsistencies and repetitious, Pavlovian-like responses to rehearsed cues, found it to contain a degree of unreliability. Accordingly, the family court gave the appropriate weight to such testimony.

This Court, itself, has recognized the concern with the reliability of child testimony in cases of child abuse in Idaho v. Wright, 497 U.S. 805 (1990). In the specific context of a Confrontation Clause challenge to a doctor's testimony regarding incriminating statements of a three-year old child, the Court noted, "that it is possible that '[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.'" Id. at 826-27 (quoting State v. Robinson, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987)). It was precisely this type of coaching and manipulation,

observed in the courtroom, that served as the basis for the family court's findings on the reliability of the children's testimony (Pet. App. at 20A-22A.)

In this case, there was ample evidence from which the family court could determine that the testimony of the children was unreliable, including the contradictions in their testimony and the obviously rehearsed testimony. Such judicial rulings supported by the record "almost never constitute [a] valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994). Petitioner's reliance on the family court's adverse rulings on the evidence presented by Dr. Shuh (Petitioner at pp. 22-24), is also no basis for a finding of judicial basis. Id.

Similarly, the remark at the end of the order on reconsideration regarding the objectivity of Petitioner, her counsel, and her witnesses is not extra-judicial, but derived from the family court's observation of these people in the courtroom in this case. Once again, the obvious coaching of the daughter in the use of the anatomically correct dolls and the testimony of James that "Ms. Thea" had asked him to draw a picture of his father engaging in sexually abusive behavior serve as a basis for the family court's statement. Because the remark is grounded in the conduct observed by the judge in the courtroom, a finding of bias is unwarranted. Id. at 550-51.

CONCLUSION

For the reasons set forth above, the petition in this case should be denied.

Respectfully submitted,

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